

IV. Commission Deliberations and Recommendations

Capital Litigation Resources Legislation

On December 14, 2000, the Commission endorsed draft legislation creating a statewide capital public defender office to represent indigent capital defendants in post-conviction relief proceedings. The Direct Appeal/ PCR Subcommittee presented information to the Commission showing that 8 capital cases had been in a holding pattern at the PCR stage because no lawyers were available to represent the defendants. Some of those defendants had been waiting for over 18 months for a lawyer to be appointed to represent them at the PCR stage. Final appeals in federal court can not go forward until the PCR stage of appeals is complete in Arizona state courts. Exhibit 28 of the Data Set I Research Report shows time intervals for the PCR process.

On January 30, 2001, the Commission considered information provided by the defense bar, trial judges on the Commission, and prosecutors regarding the need for a statewide trial public defender office for capital cases. Commission members made clear that capital defense at the trial stage in rural Arizona needed assistance because of the difficulty recruiting public defenders in the rural counties and the issue of adequate compensation for lawyers coming from urban areas to do capital defense work in rural areas. At that meeting the Commission approved an amendment to the draft bill to include both a trial defender for rural Arizona and a PCR defender for all of Arizona. A drafting Subcommittee composed of Judge Michael Ryan, former Yavapai County Attorney Charles Hastings and Phoenix defense attorney John Stookey was appointed to redraft the bill. The Subcommittee met on January 31, 2001 to redraft the bill, and the amended bill was sent to the Legislature the week of February 5, 2001. The bill became Senate Bill 1486, passed the Senate (27 to 2) and the Judiciary Committee of the House (9 to 0), but was not heard in the House Appropriations Committee. The bill died when the legislative session ended on May 10, 2001.

The Commission, in a meeting on May 15, 2001, to consider this Interim Report and the issue of Capital Litigation Resources, issued this statement:

The Commission unanimously agrees that additional resources must be made available for capital cases and it deeply regrets the Legislature did not resolve this need this year. The objective of the Capital Case Commission "is to review the capital punishment process in Arizona in its entirety to ensure that it works in a fair, timely and orderly manner." A necessary condition of a "fair" capital system is competent defense representation. A necessary condition of a "timely and orderly" capital system is adequate resources for defense counsel and for prosecutors in cases where the death

penalty is sought. The needs are particularly acute for defense counsel in all post-conviction relief proceedings, and for prosecutors and defense counsel at the trial level in the rural counties. The Commission therefore urges the Legislature to consider and pass legislation appropriating monies for capital litigation resources at the earliest possible opportunity.

Notice of Intent to Seek the Death Penalty Under Ariz. R. Crim. P. 15.1(g)(1)

On January 30, 2001, the Commission heard reports from both the Pre-Trial Issues Subcommittee and the Trial Issues Subcommittee recommending amendment of Ariz. R. Crim. P. 15.1(g)(1) to extend the time for prosecutors to file notices of intent to seek the death penalty in Arizona. The Commission agreed and recommends that Ariz. R. Crim. P. 15.1 be amended to extend the time for filing of death penalty notices to 60 days after arraignment with an additional extension of time available by stipulation from the parties and approval of the Superior Court Judge. This rule change is intended to allow the prosecutor to consider mitigating evidence presented by the defense before filing the notice and to allow prosecutor more time to deliberate over the decision of whether to seek the death penalty.

Jury Deliberation in Capital Cases

On January 30, 2001, the Commission considered the Trial Issues Subcommittee's recommendation to oppose a pending Petition to Amend Ariz. R. Crim. P. 19.4 that would allow jurors in criminal cases to deliberate before receiving final instructions by the trial judge at the close of the case. The Trial Issues Subcommittee reasoned that the sequence alone may give the prosecution an unfair advantage, and further, the United States Supreme Court had not yet approved such early deliberations in criminal cases. The Commission concurred with the recommendation of the Trial Issues Subcommittee and instructed the Attorney General's Office to submit comments opposing the Petition to Amend Ariz. R. Crim. P. 19.4. Comments were filed and appear in Appendix D of this Interim Report.

Mental Retardation

On January 30, 2001, the Commission debated whether Arizona needed a statute prohibiting execution of defendants with mental retardation. At that meeting, the Pre-Trial Issues Subcommittee recommended, with some dissent, a law prohibiting the application of the death penalty to persons with mental retardation. The Subcommittee also recommended that the Commission consider and debate adopting specific standards for determining who has mental retardation.

At the February 28, 2001 meeting, the Commission considered Senate Bill 1551 which sought to prohibit the imposition of the death penalty on a defendant that has mental retardation. The

Commission debated whether current law, e.g., competence to stand trial, the insanity defense, a rigorous mitigation hearing and the competence to be executed statute, provided adequate safeguards to ensure that a person with mental retardation person would not be executed in Arizona. The Subcommittee also discussed a proposed striker that would amend Senate Bill 1551 to ensure that both prosecution and defense interests are balanced. At the February 28th meeting, the Commission reached consensus that as a matter of public policy Arizona should not execute a defendant who has mental retardation. The Commission directed the Subcommittee to consider and make recommendation on the following issue:

Should the Arizona Legislature enact a statute to ensure a mentally retarded defendant is not executed or are current safeguards in the law sufficient?

On March 28, 2001, the Commission received the Pre-Trial Issues Subcommittee report recommending that Arizona enact a statute to ensure a mentally retarded defendant is not eligible for the death penalty. The Commission accepted the Subcommittee's recommendation and noted that the Subcommittee's recommendation was a "grudging" one approved by a 6 to 4 vote. Some members believe that there are adequate safeguards and procedures in place in Arizona law to ensure that a mentally retarded defendant would not be executed.

A strike-everything amendment which attempted to balance the interests of prosecutors, advocates for persons with mental retardation, and defense attorneys passed the House after amendment and was signed into law by Governor Jane Dee Hull on April 26, 2001. The version of the bill signed into law by Governor Jane Dee Hull on April 26, 2001 is attached as Appendix D, paragraph 4.

Aggravating Factors in Arizona Law and Defining Eligibility for Capital Punishment

On March 28, 2001, the Commission heard a report from the Pre-Trial Issues Subcommittee regarding aggravating factors. The Subcommittee reported that the current statute provides for the possibility of capital punishment only in those cases in which "the murdered person was an on duty peace officer who was killed in the course of performing his official duties. . . ." A.R.S. § 13-703(F)(10). If a police officer were murdered because of his status as a police officer and the officer was in an off-duty capacity, current law would not authorize capital punishment. By a vote of 7 to 1, the Subcommittee recommended extending the aggravating factor to include peace officers killed while not performing official duties as long as the murder was motivated by the peace officer's status. The Commission approved the recommendation. See Appendix D for proposed language.

Selection of Capital Cases by Prosecutors and Defense Input

On March 28, 2001, the Commission received and approved the Pre-Trial Issues Subcommittee's unanimous recommendation that all prosecutors involved in capital case prosecution adopt a written policy for identifying cases in which to seek the death penalty, and such policies shall include soliciting or accepting defense input before deciding to seek the death penalty.

Residual Doubt in Sentencing

On March 28, 2001, the Commission received and approved the Pre-Trial Issues Subcommittee's report stating that residual doubt should not be added to Arizona's list of statutory mitigators found in A.R.S. § 13-703(G), largely because the strength of the government's proof of guilt may already be considered by the courts in Arizona during the sentencing phase of a capital case.

Competency to be Executed

The Commission first heard a report on the issue of competency to be executed on January 30, 2001, from Mr. James Bush on behalf of the Pre-Trial Issues Subcommittee. The Commission considered Mr. Bush's written recommendations and heard a three-part recommendation from the Pre-Trial Issues Subcommittee. First, the Pre-Trial Issues Subcommittee recommended that the Commission consider and debate a proposal that defendants found mentally incompetent after the issuance of a death warrant have their sentences converted to life imprisonment. The Subcommittee reported that this factual scenario would arise in the context of a judicial competency hearing in which the defendant is found incompetent and unlikely to regain competency except through involuntary medical treatment. Second, the Subcommittee recommended that the Commission consider and debate the current standards applicable to incompetence to determine if the standards as currently applied require modification. Third, the Subcommittee recommended that the Commission consider changes to the statute under which Arizona conducts restoration to competency, A.R.S. § § 13-4021 through 4024.

On February 28, 2001, the Commission again discussed the issue of competency to be executed. The Commission asked the Pre-Trial Issues Subcommittee to reconsider the issue and make a recommendation.

On March 28, 2001, the Commission heard the report from the Pre-Trial Issues Subcommittee which reflected substantial debate at two meetings on March 13 and March 20, 2001. The Subcommittee reported that it had debated the Maryland statute which narrowed the definition of incompetence to be executed by eliminating from that definition any defendants who were on medication before sentencing. The Subcommittee also considered whether Arizona doctors should be prohibited from treating any defendant facing capital punishment so that Arizona policy would reflect that no restoration to competency may take place. The Subcommittee voted 6 to 3 with one abstention to present the following recommendation to the Commission.

The Pre-Trial Issues Subcommittee recommends to the Commission that Arizona change its legislation to require the commutation of a death sentence to the maximum sentence lawfully imposeable when the defendant is found incompetent after the issuance of a death warrant.

After deliberation, the Commission voted 12 to 8 with one abstention to accept the subcommittee's recommendation.

Minimum Age For Capital Punishment.

On March 28, 2001, the Pre-Trial Issues Subcommittee reported to the Commission that it was continuing to consider this important issue, and on May 15, 2001, the Subcommittee submitted the issue to the Commission for debate. The Subcommittee did not recommend a minimum age for capital punishment eligibility. After considerable debate, the Commission heard a motion to recommend that the death penalty in Arizona not apply to defendants who were under the age of 18 at the time of the crime. The Commission approved the motion by a vote of 15 to 8.

Competence of Counsel

The Commission deliberated extensively on the competence of counsel in capital cases. The Data/Research Subcommittee identified the number of cases that were overturned based on ineffective assistance of counsel from 1974 through 2000. The Center for Urban Inquiry reported in Exhibit 24 of the Data Set I Research Report that 19 defendants received a reversal, remand, or modification in their case based on ineffective assistance of counsel. Of the 19, 13 were granted resentencings and 6 defendants were granted new trials. In those 19 cases, two defense attorneys were court appointed, one was a public defender, and one was privately retained. For a review of the issues cited as the basis for reversals, remands and modifications for all 230 cases in Data Set I, see Exhibit 14 of the Data Set I Research Report and Section III of this Interim Report.

In discussing this issue, Commission members noted that early support for a peer review program for capital defense attorneys had lessened because of the subjectivity of peer review. Further, the members urged Superior Court judges to verify early in a capital case that counsel are competent under the standards in Ariz. R. Crim. P. 6.8 and that judges should hold a hearing if necessary to advise defendants regarding competency of counsel much like hearings on conflict of interest are held under Arizona law. The Commission then turned to whether a finding of ineffective assistance of counsel should result in the mandatory reporting of that attorney to the State Bar, the mandatory removal of that attorney from the list of eligible attorneys to be appointed under Ariz. R. Crim. P. 6.8, or reporting to the county's appointing authority for indigent defense.

On March 28, 2001, the Trial Issues Subcommittee recommended to the Commission that there should be no mandatory reporting of defense attorneys when there is a finding by a court of ineffective assistance of counsel. Because those cases are taken on a case-by-case basis and because there is such a variety of holdings from trial and appellate courts in this matter, the Subcommittee believed that the criminal justice system in the State of Arizona may rely on the duty incumbent on lawyers and judges to report ethical violations under Ethical Rule 8.3 of the Rules of Professional Responsibility. The Subcommittee stressed to the Commission that the reporting under Ethical Rule 8.3 is done on a case-by-case basis, and that a particular finding by a trial or appellate court may well be inadequate to support a report of an ethical violation to the State Bar. The Commission approved this recommendation.

The Trial Issues Subcommittee further recommends that Ethical Rule 1.1 be amended to include a provision regarding the competence of lawyers representing capital defendants. The Subcommittee recommended, and the Commission approved on March 28, 2001, and May 15, 2001, that Ethical Rule 1.1 be amended to read as follows:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. A LAWYER WHO REPRESENTS A CAPITAL DEFENDANT SHALL COMPLY WITH THE STANDARDS SET FORTH IN Ariz. R. Crim. P. 6.8 REGARDING STANDARDS FOR APPOINTMENT OF COUNSEL IN CAPITAL CASES.

The Subcommittee also recommended and the Commission approved on March 28, 2001, and May 15, 2001, that the Comment to Ethical Rule 1.1 be amended to include this best practice advice:

BECAUSE THE AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES RECOMMEND TWO LAWYERS BE ASSIGNED TO EVERY CAPITAL CASE, LAWYERS SHALL ENSURE THAT TWO LAWYERS REPRESENT EVERY CAPITAL DEFENDANT WHENEVER FEASIBLE IN TRIAL PROCEEDINGS.

Aggravation/Mitigation and Sentencing Hearings, and Victim Impact Evidence In Capital Cases

The Commission deliberated on the capital sentencing process and the need to ensure that victim impact evidence is presented to the court along with the defendant's allocution at a time when the court may thoughtfully consider such evidence prior to sentencing. On January 18, 2001, the Trial Issues Subcommittee recommended to the Commission that trial judges hear victim impact evidence during the aggravation and mitigation hearing before sentencing the

defendant using the special verdict form. In addition, on March 28, and May 15, 2001, the Trial Issues Subcommittee recommended an amendment to Ariz. R. Crim. P. 26.3, the Comment to that Rule, and Administrative Order 94-16, to ensure that capital case sentencing is conducted in a proper sequence. The Subcommittee's proposed rule, comment, and order appear in Appendix B of this Interim Report.

On May 15, 2001, the Commission edited the proposed amendments to Rule 26.3 to allow the victim to "be heard" at the aggravation and mitigation hearing, to allow the defendant the right of allocution and to require the court to set a sentencing date no earlier than seven (7) days after the aggravation/mitigation hearing in order to properly reflect on the events of the hearing.

After the May 15, 2001 meeting, the Attorney General's Office rewrote the Comment to Rule 26.3 and sent it to every member of the Commission. No objections to the Comment were lodged. The Comment is intended to ensure an orderly pre-sentencing hearing, and the careful adherence to A.R.S. § 13-703 and the holding in *Payne v. Tennessee*, 501 U.S. 808 (1991), so that victims are allowed to be heard regarding the murdered person and the impact of the murder on the victim and other family members. Victims are instructed not to make sentencing recommendations as to capital counts. In the Comment, trial judges are reminded not to infer from a victim's silence either acquiescence in, or opposition to, a capital sentence. Victims are reminded that they may comment and make sentencing recommendations on all non-capital counts. The Commission's proposed Rule 26.3 and Comment are reprinted in Appendix D, paragraph 9.

Pursuant to the Commission's decision on May 15, 2001, the portions of the Supreme Court's Administrative Order 94-16 providing guidance on the conduct of capital sentencing will be included in Rule 26.3 and the Comment in the Attorney General's Petition to amend the Rules of Criminal Procedure.

The Use of Mitigation Specialists and Standards for Mitigation Specialists

On March 28, 2001, the Commission approved the Trial Issues Subcommittee's recommendation to amend Ariz. R. Crim. P. 15 to provide for the appointment of investigators and expert witnesses for indigent defendants. The Commission envisions that this rule will be used by capital defendants to obtain mitigation specialists at county expense in all capital cases at the beginning of the case. The text of the rule, as approved by the Commission, reads as follows:

Ariz. R. Crim. P. 15.9 Appointment of Investigators and Expert Witness for Indigent Defendants

- a. An indigent defendant may apply for the assistance of an investigator, expert witness, or mitigation specialist to be paid by the county if the defendant can show that such assistance is reasonably necessary to adequately present a defense at trial or sentencing.
- b. An application for the appointment of investigators or expert witnesses pursuant to this Rule shall not be made ex parte.
- c. As used in the Rule, a “mitigation specialist” is a person qualified by knowledge, skill, experience, or other training as a mental health or sociology professional to investigate, evaluate, and present psycho-social and other mitigating evidence.

Audio or Video Recording of Interviews

On March 28, 2001, the Trial Issues Subcommittee recommended and the Commission approved the recommendation that the Attorney General develop a protocol for all law enforcement agencies in Arizona for the recording by law enforcement of all advice of rights, waiver of rights, and questioning of suspects in criminal cases when feasible to do so.

Review of Capital Cases in Which Convictions Were Reversed, Or Sentences Were Remanded or Modified By the Appellate Court

In December 2000 and January 2001, the Commission agreed on a strategy for the review of those cases in which substantive errors were found by reviewing appellate courts in Arizona. The cases of conviction and sentence related reversals, remands and modifications are set forth in Exhibit 22 of the Data Set I Research Report.

Of the 141 decisions resulting in a reversal, remand or modification, the Trial Issues Subcommittee decided to review the 7 cases in which not guilty verdicts were returned upon retrial and to review the 71 cases in which the defendant was sentenced to life imprisonment or a term of years after retrial or resentencing. The Commission established a uniform set of guidelines to assist in examining these cases. Commission members were asked to consider issues such as why the conviction or sentence was reversed; whether the error is likely to reoccur; whether safeguards were in place at the time of the original trial or have since been adopted; and whether Commission members recommend changes based on the cases reviewed.

The Trial Issues Subcommittee has invited Commission members to join them this summer for an in-depth study of the 78 cases. The goal of the study is to determine whether additional recommendations for reform are needed. The issues which formed the basis for reversals,

remand or modification for these cases are depicted in Exhibits 14 through 19 of the Data Set I Research Report.

Prolonged Time Intervals in Direct Appeal Proceedings

In its February and March, 2001 meetings, the Commission considered the prolonged time intervals in the direct appeal process for capital cases. These time intervals are depicted in Exhibits 25, 27 and 30 of the Data Set I Research Report. The Commission heard a report from the Direct Appeal/PCR Subcommittee regarding delays in the system due to missing court documents, pleadings and exhibits, and the difficulties in obtaining transcripts in trial proceedings. The Subcommittee met with elected court clerks and with court reporters from around Arizona.

On March 28, the Direct Appeal/PCR Subcommittee made three recommendations which were approved by the Commission. First, the Commission recommends amending Ariz. R. Crim. P. 31.9 so that the clerk of the court in capital cases will be required to notify all court reporters, within ten days of the filing of the notice of appeal, to compile all transcripts for submission to the Clerk of the Supreme Court. This rule change is designed to give the court reporters more timely notice and to expedite preparation of transcripts. Secondly, the Commission recommends as a best practice that trial judges order the transcription of all trial proceedings in every first degree murder case at the time a guilty verdict is returned. This will cause reporters and clerks to begin the transcription process and the process of gathering exhibits, pleadings and minute entries well before the sentencing date. This practice will expedite transmission of records in a capital case, and will hopefully preserve records in this cases in a more disciplined fashion.

Thirdly, the Commission recommends as a best practice that Superior Court clerks enter a code on all criminal calendars that clearly identifies all first degree murder cases for use by reporters and court clerks. No matter what ultimate code the local clerk selects, the calendar will communicate to the court reporter and to the court room clerks that the matter is potentially a capital case and that records should be assembled early and safeguarded with the utmost care. Court reporters will then know that transcripts must be readily available immediately after sentencing because the capital case must be sent to the Supreme Court within 45 days after the filing of the notice of appeal. The courtroom clerks will be put on notice that because this is a capital case, the attorneys will later request every piece of paper, pleading and minute entry in the case to ensure that the law was followed in the litigation of the case. The Commission concluded that these reforms will go a long way in removing some of the prolonged time intervals in capital case appellate process.

The Commission's proposed Rule 31.9 is reprinted in Appendix D, paragraph 11.

The Prolonged Time Intervals in Post-Conviction Relief Proceedings

The Commission debated the issues of prolonged intervals in PCR proceedings (depicted in Exhibits 25, 28 and 31 of the Data Set I Research Report), and adopted two recommendations in this regard. The Commission recommends that a repository be created in each county for all trial and appellate defense files so that PCR counsel can readily locate files from one location. The repository must be controlled by the defense team, and strict confidentiality must be maintained. Secondly, the Commission strongly recommended that Senate Bill 1486 be enacted so that PCR counsel could be appointed as soon as possible to represent capital defendants. Today, the Arizona Supreme Court cannot appoint PCR counsel for many defendants because no qualified counsel are available. The Commission recognized that 6 defendants were awaiting PCR counsel and that many of those defendants had been waiting for over 22 months. The Commission concluded that this is one of the principal causes of delay in processing capital cases in Arizona.

Proposed Reforms in Ariz. R. Crim. P. 31 and 32

On March 28, 2001, the Commission considered reforms to Ariz. R. Crim. P. 31 and 32 to eliminate some of the prolonged time intervals in these appellate proceedings. The Commission has noted that the Supreme Court's latest changes to Ariz. R. Crim. P. 32 included a Comment in the rule-making specifically stating that

“The Supreme Court did not have the benefit of the comments of a statewide Commission which was empaneled that year by the Attorney General of Arizona to investigate and assess the administration of the death penalty in the State of Arizona. Accordingly, further amendments to Ariz. R. Crim. P. 32 may be necessary following the issuance of that Commission's recommendations. In particular, the topics of deadlines and victims rights may need to be addressed at that time.”

The Commission also considered victim's right to a “prompt and final conclusion of the case after conviction and sentence” under the Arizona Constitution in Article 2, Section 2.1(10). The Commission tried to balance the victim's right with the defendant's right to a fair appellate process, including adequate preparation time. The Commission did not reach consensus on this matter and asked the Direct Appeal/PCR Subcommittee to reconvene on the issue of the victim's right to a prompt and final conclusion of criminal cases and to debate any other rule changes in Ariz. R. Crim. P. 31 and 32 which specifically relate to the death penalty and which could reduce time intervals in the appellate process.

On May 3 and 14, 2001, the Subcommittee deliberated on the additional issue of whether a victim should have an opportunity to be heard in all appellate proceedings where there is a request for an extension of time. On May 15, 2001, the Commission deliberated on two

proposed rules to be added in Rule 31.27 for Direct Appeals and Rule 32.10 for Post-Conviction Relief proceedings.

First, the Commission considered Mr. Steve Twist's substitute motion for the passage of a rule creating a right to be heard in appellate motions for lengthy extensions. The Commission defeated the following proposed rule by a vote of 11 to 8.

In any capital case, in ruling on any second or subsequent request for an extension by a party of more than 30 days, the court, after giving any victim who has filed a request pursuant to A.R.S. 13-4411, the opportunity to be heard in writing, shall consider the rights of the defendant and the rights of any victim to a prompt and final conclusion of the case.

Comment: To implement the victim's right to a prompt and final conclusion to their case, see Ariz. Const. Art. 2, § 2.1(A)(10), the victim, upon request, shall be permitted to be heard in writing with respect to any lengthy or repetitive extensions or the victim can request that the prosecutor's office communicate the victim's views to the court concerning any extensions.

Secondly, the Commission considered the Subcommittee's recommended rule change on appellate extensions and unanimously recommended the following language for passage by the Supreme Court:

In any capital case, in ruling on any request for an extension of a time limit set in this rule, the court shall consider the rights of the defendant and any victim to prompt and final resolution of the case.

Comment: To implement the victim's right to a prompt and final conclusion of the case, see Ariz. Const. Art. 2, § 2.1(A)(10), the victim shall be permitted to file a statement with the court, at the inception of the proceeding, which expresses their views with respect to any extensions. Or, the victim can request, pursuant to A.R.S. § 13-4411, that the prosecutor's office communicate the victim's views to the court concerning any extensions.

Commission Comments

Copies of the draft of this Interim Report were sent to Commission members for comment. Paul W. Ahler, Chief Deputy to the Honorable Richard M. Romley, Maricopa County Attorney, filed these comments on the issue of minimum age as a bar to the death penalty and restoration to competency:

The Maricopa County Attorney's representative on the Capital Case Commission voted against the recommendation to prohibit the use of the death penalty on those

Richard M. Romley Comment (continued)

defendants that commit their crimes when they are under the age of 18; and the recommendation that if a capital inmate is deemed incompetent to be executed that the death sentence would be vacated for a life sentence rather than attempting to restore the inmate to competency. This is an explanation of the position of the Maricopa County Attorneys Office and why the office believes that the recommendations of the Commission on these two points are not good public policy.

THE AGE OF 18 AS AN ABSOLUTE BAR TO THE DEATH PENALTY

A.R.S. § 13-703(G)(5) provides that the trial court shall consider whether the defendant's age at the time he committed the offense is a mitigating factor. Arizona's courts have continuously recognized that the young age of a defendant convicted of first degree murder is "a substantial and relevant factor" to be given "great weight," although they have also acknowledged that age alone will not act to require life imprisonment in every case of first degree murder by a minor. State v. Valencia, 132 Ariz. 248, 250 (1982). The United States Supreme Court has also found a minor's age to be "a relevant mitigating factor of great weight." Eddings v. Oklahoma, 455 U.S. 104, 117, 102 S.Ct. 869, 877 (1982). The United States Supreme Court, consistent with the Arizona statute, found that while the imposition of the death penalty on those that committed their crimes while 15 or younger violated the Eighth Amendment, that imposition of the death penalty on defendants for crimes committed at age 16 or 17 did not violate the prohibition against cruel and unusual punishment. Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969 (1989); Cf. Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687 (1988) (eighth amendment prohibits imposition of death penalty on defendant who committed first degree murder at age 15).

So while the age of a defendant may be a mitigating circumstance, in assessing age as a mitigator, courts also consider intelligence, State v. Laird, 186 Ariz. at 209; level of maturity, id.; judgment, Jackson, 186 Ariz. at 31; past experience, id. at 30; criminal history, Murray, 184 Ariz. at 43; and involvement in the crime, Jackson, 186 Ariz. at 30. In short, Arizona law recognizes the obvious--not all 16 and 17 year olds are equal in maturity, judgment, and the like. The application of the statute has worked very well. There have only been a handful of defendants

who were under 18 and who actually had the death penalty imposed by the trial court. Even fewer had their death sentences affirmed by the Arizona Supreme Court. In looking at each one of the cases where the death sentence was affirmed, not one case stands out as an aberration. In fact, in the debate before the Commission not one example was used to identify a problem with the present system.

The primary evidence submitted on this issue was a claim that MRI studies showed lack of brain development in people under the age of 18. This use of MRI technology

Richard M. Romley Comment (continued)

to explain behavior is similar in character to PET scan images in criminal cases which have been discredited as “junk science.” PET scan images have been banned by the California courts for not being generally accepted in the medical community. In short, the Commission wants to solve a problem that does not exist; to draw a bright line that would exclude individuals who commit heinous crimes from receiving what society believes is the appropriate punishment; all in the name of a study where the author herself recognizes that the study cannot prove the explanation the Commission wishes to draw. The Maricopa County Attorneys Office disagrees with this recommendation and contends that the current law in this area is better public policy.

RESTORATION TO COMPETENCY V. REDUCING A DEATH SENTENCE TO LIFE

The Commission voted to recommend that the law in Arizona be changed to have a death sentence vacated whenever a defendant is determined to be incompetent to be executed. The present law, A.R.S. § 13-4023, requires the state mental hospital to treat and restore inmates who are determined to be incompetent to be executed. Under the present law, there is no real incentive to attempt to fake incompetency. If an inmate succeeds in delaying a scheduled execution because he finds a doctor who will certify his incompetency, such a reprieve will be short lived because he will be quickly “restored” by the state hospital. In the history of Arizona’s law, and it has been in existence since territorial days, only a few inmates have been found to be incompetent. Clearly, the incentive to use the law is lacking for the nefarious, but available to those who truly need it.

If the Commission's recommendation comes to fruition, then we can expect a slew of petitions in every capital case near the end of the already long appellate process. It will be the inmates’ last shot at trying anything to get off of death

row.

And what problem with the current law is the Commission trying to solve? Proponents of this position claim that it is unethical for doctors to treat inmates to be executed. The law is clear that the personal ethical considerations of a state employee do not interfere with the state law he/she is obligated to carry out. If the doctors at the state hospital believe that moral and ethical considerations of restoring someone to competency are too onerous, perhaps they should get a new job and let others take their place. The simple fact that the doctors at the state hospital do not want to treat these inmates should not establish policy for the state. The Maricopa County Attorney Office finds it inconsistent with sound public policy that the Commission is attempting to bow to the views of these doctors, state employees nonetheless, and create a system that will cost the state thousands of dollars as each inmate avails himself of the possibility of reprieve.

Richard M. Romley Comment (continued)

In addition, proponents claim that it is unconstitutional to force treatment on an inmate who does not want it. The federal constitution does appear to prohibit the forced treatment of those who are not a danger to themselves or others. However, courts that have looked at the issue have found that inmates that are so incompetent as to not be competent for execution are, in fact, a danger to themselves, if not staff. If, in that rare situation where an inmate deteriorates to the point where he is not competent, and competency can never be restored, current law would allow a petition to the Board of Executive Clemency for commutation of the death sentence. Again, there is no sound public policy for the recommended change and it would encourage even more delay in the system.